Sarawak Shell Bhd & Ors v Chong Thian Fook

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS Q–02–1075 OF 2004 AND Q–02–1177 OF 2004
ABDUL AZIZ MOHAMAD, MOHD GHAZALI AND ZALEHA ZAHARI JJCA
23 MARCH 2007

Labour Law — Provident fund — Contributions — Retirement benefit fund — Allegations of wrongful deductions — Deductions were made for Employees Provident Fund and Shell Sabah and Sarawak Provident Fund — Whether deductions illegal — Order for restitution — Whether there was unjust enrichment and breach of trust — Interpretation of fund regulations — Employees Provident Fund Act 1951 (repealed) — Employees Provident Fund Act 1991

The plaintiffs were 399 former employees of either the first or the second defendant company. All of them were, as employees of the companies, members of the Shell Sarawak and Sabah Retirement Benefit Fund ('the RBF'). 57 of them were also members of the Shell Sabah and Sarawak Provident Fund ('the PF'). Both the RBF and the PF are trust funds established by the companies. The PF was established as a fund to which members made or could make contributions and the employer company had to make contributions in respect of each contributing member. The plaintiffs' action concerned their entitlement under the RBF, which was established by a Trust Deed by the 'Member Companies', namely, the two defendant companies and several other Shell companies. The RBF is not a contributory fund, that is to say, the employee members do not contribute to the fund. The moneys in the fund are derived from contributions by the Member Companies and from other sources. Besides the Trust Deed, the fund is subject to the regulations annexed to it. The affairs of the RBF are managed by the Trustees of the fund. The plaintiffs' action was also against the Trustees. The plaintiffs were also members of the Employees Provident Fund ('the EPF'), which was established under the Employees Provident Fund Act 1951, which in turn was repealed and replaced by the Employees Provident Fund Act 1991 ('the Acts'). The Acts required the plaintiffs to contribute to the EPF and the two defendant companies to make employer's contributions to it in respect of the plaintiffs. The plaintiffs' grievance was stimulated by their reading of certain provisions of the aforementioned regulations relating to the RBF, namely, parts of regs 5, 7 and 8. The plaintiffs' averred that when they severally received their RBF entitlement from the first or second defendant company they discovered that from their entitlement there had been made deductions, which they listed as four items, of their employers' contributions to the EPF and the PF and of the interest or dividends declared on those contributions (the 'EPF deductions' and 'PF deductions'). They contended that the EPF deductions and PF deductions were in contravention of law, particularly the Acts. The plaintiffs prayed for several reliefs, namely; that reg 5(2) read with reg 7(1)(c) contravenes the Acts; that the EPF deductions were illegal; that the PF deductions were illegal; an order of restitution of

the sums allegedly deducted and for ancillary orders to give effect to the order for restitution; that the first and second defendant companies had unjustly enriched themselves by the alleged wrongful deductions. The defendants applied under O 14A of the Rules of the High Court 1980 for the determination by the High Court. The learned judge granted the prayers of the plaintiffs. The defendants' appealed. The learned judge, however refused the prayers about unjust enrichment and breach of trust. From that the plaintiffs' appealed.

Held, allowing the defendants' appeal and dismissing the plaintiffs' appeal:

(1) The aim of the member companies in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF, that is the accrued benefits (set out in sub-cl (2) of reg 5, in paras (a) and (b), certain benefits that have already accrued or been paid to a member) do not come up to that amount, then the RBF will come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF. Or if the accrued benefits are more than the level of benefit, as happened in the case of a few plaintiffs, the target has been exceeded, and nothing is due from the RBF. The member will be enjoying, or will have enjoyed, a greater amount of retirement benefits than the target set by the RBF (see para 16).

(2) Arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-cl (3) of reg 5, all that needs to be done is to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum. That is what was done in the calculations of the RBF entitlement of members that have been exhibited in this case. The summary of each calculation begins with the 'Opening Balance', which is the level of benefit. The deductions come after the word 'Less'. In all cases there are the EPF deductions. In a few cases there are also the PF deductions. These deductions are respectively described as 'Company Contribution on EPF' and 'Company Contribution on SSSPF'. But the deductions are only an arithmetical or accounting way of arriving at the sufficient lump sum. They were not deductions by taking away from the member. The member was not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF was to ensure that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit (see para 17).

(3) The defendants were right in their stand that in arriving at the lump sum they acted within reg 5(2) and that, as far as concerned the plaintiffs' grievance as to deductions made, the manner in which they arrived at the lump sum did not involve reg 7 (see para 19).

(4) The last sentence of sub-cl (2) of reg 5 says: 'In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7', which

sets out the deductions that are to be made, not in calculating the lump sum constituting the benefit due from the RBF, but 'in calculating the amount of a Member's benefit'. These words echoed the words in reg 5(1): 'the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8', sub-cl (1) of which says: 'When a Member leaves Company Service … he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 …'. The term 'net amount' simply meant that while the benefit due to a member from the RBF is the sufficient lump sum specified in sub-cl (2) of reg 5, what is actually to be paid to him is the net amount after making the deductions authorized by reg 7, if any. If no deduction falls to be made under that regulation, the net amount is the full lump sum. In this case, if there had been any deduction to be made under reg 7 it would have been made. In this case there was only one instance of 'deduction' of the EPF and PF benefits and that was an arithmetical or accounting deduction to arrive at the sufficient lump sum, and not a deprivative deduction. There had not been another instance of deduction of those benefits, to be seen as a reg 7(1)(c) deduction (see paras 20, 25).

(5) Regulation 7(1) did not mention employer's EPF contributions. It could not have been the intention of the member companies who established the RBF and the regulations to deduct employer's EPF contributions from the sufficient lump sum that constitutes the benefit payable under the RBF and to resort to para (c) of reg 7(1) to enable that to be done, and therefore it could not have been their intention that the paragraph be subtly framed using the words in question to achieve that purpose, because to deduct employer's EPF contributions from the lump sum would not only expose them to accusations of illegal action and fraud on employees but would result in no employee getting any benefit from the RBF and in the RBF becoming a futile exercise, and it was inconceivable that those companies would embark on such an absurd, pointless and perilous undertaking (see para 26).

[Bahasa Malaysia summary

Plaintif-plaintif merupakan 399 bekas pekerja sama ada syarikat defendan pertama atau kedua. Mereka semua merupakan pekerja syarikat-syarikat, ahli-ahli Tabung Faedah Persaraan Shell Sarawak dan Sabah ('RBF"). 57 daripada mereka juga ahli-ahli Tabung Simpanan Shell Sarawak dan Sabah ('PF'). Kedua-dua RBF dan PF merupakan tabung amanah yang ditubuhkan oleh syarikat-syarikat tersebut. PF telah ditubuhkan sebagai satu tabung di mana ahli-ahli dapat membuat atau telahpun membuat caruman dan majikan syarikat perlu membuat caruman untuk setiap ahli yang mencarum. Tindakan plaintif-plaintif adalah berkaitan kelayakan mereka di bawah RBF, yang ditubuhkan oleh surat ikatan amanah oleh 'syarikat-syarikat ahli. Iaitu kedua-dua syarikat defendan dan beberapa syarikat Shell lain. RBF bukan suatu tabung caruman, iaitu, ahli pekerja tidak mencarum ke dalam tabung itu. Wang dalam tabung datangnya daripada caruman oleh syarikat-syarikat ahli dan daripada sumber lain. Selain surat ikatan amanah itu, tabung itu tertakluk kepada peraturan-peraturan yang datang dengannya. Urusan RBF dikendalikan oleh pemegang amanah tabung itu. Tindakan plaintif-plaintif juga adalah terhadap

pemegang amanah. Plaintif-plaintif juga adalah ahli-ahli Kumpulan Wang Simpanan Pekerja ('EPF'), yang ditubuhkan di bawah Akta Kumpulan Wang Simpanan Pekerja 1951, yang telah dimansuhkan dan diganti dengan Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta-Akta tersebut'). Akta-Akta tersebut menghendaki plaintif-plaintif mencarum kepada EPF dan kedua-dua syarikat defendan untuk membuat caruman majikan kepada plaintif-plaintif berkaitan. Kilanan plaintif-plaintif disebabkan oleh pembacaan mereka tentang peruntukan tertentu berhubung peraturan-peraturan yang dinyatakan berkaitan RBF, iaitu, bahagian-bahagian tertentu dalam peraturan-peraturan 5, 7 dan 8. Plaintif-plaintif menegaskan bahawa apabil mereka secara berasingan menerima kelayakan RBF mereka daripada syarikat defendan pertama atau kedua mereka mendapati bahawa daripada kelayakan mereka terdapat potongan yang dibuat, yang mana mereka telah senaraikan sebagai empat item, berhubung caruman majikan mereka kepada EPF dan PF dan berhubung faedah atau dividen yang diisytiharkan ke atas caruman-caruman tersebut ('potongan EPF' dan 'potongan PF'). Mereka menegaskan abhawa potongan EPF dan potongan PF tersebut bertentangan dengan undang-undang, khususnya Akta-Akta tersebut. Plaintif-plaintif memohon untuk beberapa relief, iaitu, bahawa peraturan 5(2) dibaca dengan peraturan 7(1)(c) adalah bertentangan dengan Akta-Akta tersebut; bahawa potongan EPF tersebut menyalahi undang-undang; satu perintah restitusi terhadap jumlah yang dikatakan telah dipotong dan untuk perintah sampingan untuk menguatkuasakan perintah restitusi itu; bahawa syarikat defendan pertama dan kedua secara tidak adil telah menambahkan kekayaan mereka dengan potongan yang dikatakan salah. Defendan-defendan telah memohon untuk A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 untuk keputusan oleh Mahkamah Tinggi. Hakim yang bijaksana telah membenarkan permohonan-permohonan plaintif-plaintif. Defendan-defendan telah merayu. Hakim yang bijaksana, bagaimanapun menolak permohonan-permohonan berhubung pengkayaan tak patut dan pelanggaran amanah. Berdasarkan itu plaintif-plaintif merayu.

Diputuskan, membenarkan rayuan defendan-defendan dan menolak rayuan plaintif-plaintif:

(1) Tujuan syarikat-syarikat ahli dalam menubuhkan RBF adalah untuk memastikan bahawa di akhir perkhidmatannya pekerja akan menikmati, atau telahpun menikmati, faedah persaraan daripada semua sumber daripada sekurang-kurangnya sejumlah tertentu. Jika faedah adalah daripada sumber selain RBF, iaitu faedah terakru (dinyatakan dalam sub-kl (2) peraturan 5, dalam perenggan (a) dan (b), faedah tertentu yang telahpun terakru atau dibayar kepada seorang ahli) tidak sampai kepada jumlah tersebut, maka RBF akan campur tangan untuk mencukupkan kekurangan itu dengan memberikannya. Sasaran jumlah adalah tahap faedah dan kekurangan yang telah ditampung adalah faedah yang dijangka daripada RBF. Ia merupakan tambahan. Jika tiada kekurangan, sasaran RBF tercapai dan tiada yang perlu dibayar daripada RBF. Atau sekiranya faedah terakru melebihi daripada tahap faedah, seperti yang berlaku dalam kes beberapa plaintif, sasaran telah melebihi dan tiada yang perlu dibayar daripada RBF. Ahli akan menikmati, atau

telahpun menikmati, jumlah persaraan yang lebih besar daripada sasaran yang ditetapkan oleh RBF (lihat perenggan 16).

(2) Secara aritmetik atau dalam perakaunan, untuk tiba kepada jumlah sekaligus yang mencukupi untuk memberi agregat faedah terakru kepada tahap faedah yang ditetapkan dalam sub-kl (3) peraturan 5, apa yang perlu dilakukan adalah untuk menolak faedah terakru daripada tahap faedah dan akan tiba kepada perbezaan atau tambahan, yang mana, jika ada, merupakan jumlah sekaligus itu. Inilah yang berlaku dalam pengiraan kelayakan keahlian RBF yang telah diekshibitkan dalam kes ini. Ringkasan setiap pengiraan bermula dengan 'Opening Balance', yang merupakan tahap faedah. Pemotongan berlaku selepas perkataan 'Less'. Dalam semua kes terdapat potongan EPF. Dalam beberapa kes terdapat juga potongan PF. Potongan tersebut masing-masing digambarkan sebagai 'Company Contribution on EPF' dan 'Compnay Contribution on SSSPF'. Namun potongan tersebut hanya cara aritmetik atau perakaunan untuk tiba kepada jumlah sekaligus yang mencukupi. Ianya bukan potongan yang diambil daripada ahli. Ahli tidak terkilan terhadap potongan caruman EPF dan PF. Kehilangan sebegini tidak boleh berlaku, apabila tujuan RBF adalah untuk memastikan bahawa, dengan faedah terakru, dan mana-mana tambahan yang perlu daripada RBF, ahli itu sekurang-kurangnya akan menikmati tahap faedahnya (lihat perenggan 17).

(3) Defendan-defendan betul dalam pendirian mereka bahawa untuk mendapat jumlah sekaligus itu mereka bertindak menurut peraturan 5(2) dan bahawa, setakat mana yang berkaitan kilanan plaintif-plaintif berhubung potongan yang dibuat, cara mereka mendapat jumlah sekaligus itu tidak melibatkan peraturan 7 (lihat perenggan 19).

(4) Ayat akhir sub-kl (2) peraturan 5 menyatakan: 'In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7', yang menetapkan potongan yang perlu dibuat, bukan dengan menira jumlah sekaligus yang terbentuk daripada faedah yang perlu dibayar daripada RBF, tetapi 'in calculating the amount of a Member's benefit'. Perkataan-perkataan tersebut sama dengan perkataan dalam peraturan 5(1): 'the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8", sub-clause (1) of which says: "When a Member leaves Company Service … he shall be entitled to be paid the net amount of his benefit calculated in accordance with regulation 5 …'. Istilah 'net amount' bermaksud apabila faedah yang perlu dibayar kepada seorang ahli daripada RBF adalah jumlah sekaligus yang mencukupi dalam sub-kl (2) peraturan 5, apa yang sebenarnya perlu dibayar kepadanya adalah jumlah bersih selepas membuat potongan yang disahkan oleh peraturan 7, jika ada. Jika tidak potongan adalah jumlah sekaligus sepenuhnya. Dalam kes ini, jika tidak terdapat apa-apa potongan yang perlu dibuat di bawah peraturan tersebut, jumlah bersihnya adalah jumlah sekaligus sepenuhnya. Dalam kes ini, jika terdapat apa-apa potongan yang perlu dibuat di bawah peraturan 7 ia telahpun dibuat. Dalam kes ini hanya sekali terdapat 'deduction' faedah EPF dan PF dan itu merupakan potongan aritmetik atau perakaunan untuk tiba kepada jumlah

had to make contributions in respect of each contributing member. The plaintiffs' action concerned their entitlement under the RBF, which was established with effect from 1 January 1976 by a trust deed made on 6 December 1976 by the 'Member Companies', namely, the two defendant companies and several other Shell companies, who desired to establish the RBF 'for the benefit of those of their employees whose domicile is in Sarawak or Sabah or (being domiciled outside Malaysia) are employed in Sarawak or Sabah'. The RBF is not a contributory fund, that is to say, the employee members do not contribute to the fund. The moneys in the fund are derived from contributions by the Member Companies and from other sources. Besides the trust deed, the fund is subject to the regulations annexed to it. The affairs of the RBF are managed by the trustees of the fund. The plaintiffs' action was also, besides the two defendant companies, against the Trustees, seven of them originally, but subsequently the number was reduced to four. The plaintiffs were also members of the Employees Provident Fund ('the EPF'), which was established under the Employees Provident Fund Act 1951, which in turn was repealed and replaced by the Employees Provident Fund Act 1991. The Acts required the plaintiffs to contribute to the EPF and the two defendant companies to make employer's contributions to it in respect of the plaintiffs.

[2] The plaintiffs' grievance was stimulated by their reading of certain provisions of the aforementioned regulations relating to the RBF, namely, parts of regs 5, 7 and 8. Of reg 5, it is necessary to look only at sub-cll (1), (2) and 3(a)(b):

> 5(1) When a Member leaves Company Service (other than a Member who dies in Company Service) the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 or because of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the Employing Company determine otherwise).
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> (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:
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> (a) so much of a Member's balance at the time he leaves Company Service as amounts to contributions made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon in
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> (i) the Local Provident Fund, and
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> (ii) the State Fund, and
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> (iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and
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> (b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is included in his Accredited Service,
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> up to the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7.
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> (3)(a) The level of benefit applicable to a Member who

sekaligus yang mencukupi, dan bukan satu potongan kilanan. Tiada lagi potongan faedah tersebut yang lain, yang dilihat sebagai potongan peraturan 7(1)(c) (lihat perenggan 20, 25).

(5) Peraturan 7(1) tidak menyebut tentang caruman EPF majikan. Ia mungkin niat syarikat-syarikat ahli yang menubuhkan RBF dan peraturan untuk memotong caruman EPF majikan daripada jumlah sekaligus yang mencukupi yang mana membentuk faedah yang boleh dibayar di bawah RBF dan untuk merujuk kepada perenggan (c) peraturan 7(1) bagi memastikan ia dilaksanakan, dan oleh itu tidak mungkin niat mereka agar perenggan itu dibentuk secara tidak ketara menggunakan perkataan-perkataan yang dipersoalkan untuk mencapai tujuan tersebut, kerana untuk memotong caruman EPF majikan daripada jumlah sekaligus itu tidak akan hanya mendedahkan mereka kepada tuduhan bertindak menyalahi undang-undang dan fraud ke atas pekerja-pekerja tetapi akan menyebabkan tiada pekerja mendapat apa-apa faedah daripada RPF dan di mana RBF menjadi latihan yang tidak berguna, dan ia sukar untuk dipercayai bahawa syarikat-syarikat tersebut memulakan kerja yang mustahil, tiada faedah dan sangat berbahaya (lihat perenggan 26).]

Notes

For cases on contributions, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1594–1595.

Legislation referred to

Employees Provident Fund Act 1951 (repealed) s 9(1)
Employees Provident Fund Act 1991 s 47(1)
Rules of the High Court 1980 O 14A

Robert Ham (Dato' Cecil Abraham, Jimmy Wee and Shanti Mogam with him) (Jimmy HT Wee & Co) for the appellants in appeal No Q–02–1075 of 2004 and the respondents in appeal No Q–02–1177 of 2004.

Dato' Cyrus Das (Eric HS Khoo, Steven Thiruneelakandan, Gabriel CH Kok and David Mathew with him) (Khoo & Co) for the respondents in appeal No Q–02–1075 of 2004 and the appellants in appeal No Q–02–1177 of 2004.

Abdul Aziz Mohamad JCA (now FCJ, delivering judgment of the court):

[1] The parties in these two appeals will be referred to as the plaintiffs and defendants. These two appeals arose from orders made by the High Court at Miri on 20 September 2004 in an action brought by the plaintiffs. The plaintiffs are 399 former employees of either the first or the second defendant company. All of them were, as employees of the companies, members of the Shell Sarawak and Sabah Retirement Benefit Fund ('the RBF'). 57 of them were also members of the Shell Sabah and Sarawak Provident Fund ('the PF'). Both the RBF and the PF are trust funds established by the companies. The PF was established in March 1968 as a fund to which members made or could make contributions and the employer company

(i) has reached age 55, or

(ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

(iii) has left Company Service because of chronic disability,

shall be either the aggregate of

2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990;

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991;

2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991; and

2.2. x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

OR

2.25 x Relevant Earnings x years of Accredited Service;

whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings.

[3] Of reg 7, it is necessary to look only at sub-cl (1) and, of the four paragraphs of amounts under it, to look only at para (c):

7(1) The Authorised Deductions to be made in calculating the amount of Member's benefit will be the sum of the following amounts:

(c) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall by law or pursuant to any collective contract or to any award, judgement or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression 'collective contract' shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;

[4] Of reg 8, it is necessary to look only at sub-cl (1):

8(1) When a Member leaves Company Service:

(a) on or after reaching age 55, or

(b) because of chronic disability,

he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 and, subject to the provisions of Regulation 9 hereof (if applicable), payment shall be made to him as soon as possible and in any event within 3 months after cessation of Company Service.

[5] The plaintiffs' essential grievance was expressed in paras 22 and 23 of their amended statement of claim. There they averred that when they severally received their RBF entitlement from the first or second defendant company they discovered that from their entitlement there had been made deductions, which they listed as four items, of their employers' contributions to the EPF and the PF and of the interest or dividends declared on those contributions. They contended that the deductions, which will be referred to simply as the 'EPF deductions' and 'PF deductions', were in contravention of law, 'particularly' the EPF Acts of 1951 and 1991. The provisions of the EPF Acts that they said were contravened are, as they said in paragraph 24 of their amended statement of claim, s 9(1) of the 1951 Act and s 47(1) of the 1991 Act.

[6] It is convenient at this point to set out those sections. Section 9(1) of the 1951 Act said:

> 9(1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct from the wages or remuneration of, or otherwise to recover from, the employee the employer's contribution.

Section 47(1) of the 1991 Act says:

> 47(1) Notwithstanding any contract to the contrary, the employer shall not be entitled to deduct or otherwise recover from the wages or remuneration of the employee, the employer's contribution, from the employee.

[7] In para 35 of their amended statement of claim the plaintiffs prayed for several reliefs. Subparagraphs (1) and (2) were for declarations that 'Regulation 5(2) read with reg 7(1)(c) … contravenes' those sections. Subparagraph (3) was for a declaration that the alleged EPF deductions were illegal. Obviously the alleged illegality hinged on the alleged contravention of those sections of the EPF Acts. Subparagraph (4) was for a declaration that the alleged PF deductions were illegal. Unlike it was in the case of the EPF deductions, the basis for the allegation of illegality of the alleged PF deductions was not the subject of any declaration that was sought. It was merely averred generally in paras 28 and 29, where the plaintiffs asserted that the alleged deductions were done 'without any authority in law' and that 'the … Trust Deed and Regulations of the PF itself do not authorize the … deductions'. As far as can be seen, there has been no submission in this appeal on the averments in paras 28 and 29. Subparagraphs (5) to (8) of para 35 were essentially for an order of restitution of the sums allegedly deducted and for ancillary orders to give effect to the order for restitution. Subparagraph (9) was for a declaration that the first and second defendant companies had unjustly enriched themselves by the alleged wrongful deductions. Subparagraph (10) was for a declaration that the Trustee defendants were in breach of trust in failing to make restitution of the alleged deductions to the plaintiffs. Subparagraph (11) was for an order for damages for the alleged breach of trust.

[8] The defendants denied the alleged deductions. Their case was, as may be understood from paras 20 and 22 of the statement of defence of the Trustee defendants, that by virtue of reg 5(2) the benefit due to a member from the RBF was

a lump sum sufficient to bring the aggregate of the EPF and PF contributions and the interest on them up to the appropriate level specified in reg 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of that lump sum did not involve any deduction whatsoever. The defendants' case therefore did not involve reg 7(1)(c) at all.

[9] The defendants applied under O 14A of the Rules of the High Court 1980 for the determination by the High Court of four questions. By consent the application was granted with the addition of eight questions brought up by the plaintiffs. There were therefore twelve questions. Question No1, which was the defendants' question, was as follows:

> 1 Upon a construction of the Regulations of the Shell Sarawak and Sabah Retirement Fund as to whether the benefit payable to a member is either;
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> (a) the sum equal to what is specified as the 'level of benefit applicable' as mentioned in Regulation 5(3)(a); or
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> (b) is a lump sum which is sufficient to bring the aggregate of the contributions (as hereinafter defined) up to the level of benefits specified in Regulation 5(3)(a).
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> (The term 'contributions' is defined to mean the contributions made by the Employing Company to the Employees Provident Fund, the Shell Sarawak and Sabah Provident Fund and other specified Funds and the interest thereon.)

Paragraph (b) of the question reflected the defendants' case. Paragraph (a) reflected what the defendants conceived the plaintiffs' case to be and what was in fact the plaintiffs' case. The learned judge (Judicial Commissioner), decided on para (a) as the answer. The next three questions, also the defendants' questions, were on the basis that para (b) was the answer to question No 1. The questions were whether the para (b) calculation was in breach of the EPF Acts (question No 2), and whether the employer companies, by paying the RBF benefits according to the para (b) calculation, had unjustly enriched themselves (question No 3) or had acted in breach of trust (question No 4).

[10] The rest of the questions were the plaintiffs'. Question No 5 was whether the making of the alleged EPF deductions was in contravention of the EPF Acts. Question No 6 was whether 'Regulation 5(2) read with Regulation 7(1)(c)', which the question said 'purports to authorize deductions of the employers' contributions to the EPF', was ultra vires the EPF Acts. The learned judge answered questions Nos 5 and 6 in the affirmative. Question No 7 need not be stated because the learned judge declined to answer it on the ground that it was framed too broadly, and nothing has turned on it in this appeal. Question No 8 was whether, 'pursuant to' the two EPF sections, an employer was entitled to deduct, in any manner howsoever described, from the wages or remuneration of the employee, the employer's EPF contributions and the dividends declared on them. The learned judge answered that an employer was not so entitled. Question No 9 was whether the first and second defendant companies could 'in law' deduct the employers' contributions to the PF and the interest on them from the plaintiffs' RBF entitlement. The judge answered that they could not. Question No 10 was about unjust enrichment. The judge answered that there was no unjust enrichment. Question No 11 was whether the plaintiffs were entitled to a full reimbursement and restitution of their total RBF and

PF entitlements. The learned judge answered that they were. Question No 12 was about breach of trust. The learned judge's answer was that there was no breach of trust.

[11] The learned judge therefore granted the prayers in sub-paras (1) to (8) of para 35 of the amended statement of claim. From that arose the defendants' appeal No 1075. The learned judge refused the prayers in sub-paras (9) to (11) about unjust enrichment and breach of trust. From that arose the plaintiffs' appeal No 1177.

[12] Having considered the regulations in question and the arguments of both sides, we will state our understanding of the regulations. It is clear from the aforesaid paragraphs of the statement of defence and the defendants' questions Nos 1 to 4, that, as far as concerned what they saw the deductions that the plaintiffs were aggrieved about to be, they had acted in accordance with and within the confines of reg 5, especially sub-cl (2) thereof up to, but not including, its last sentence, which leads to reg 7, so that that last sentence and reg 7 did not enter into what they did.

[13] Subclause (3) of reg 5 concerns the 'level of benefit applicable to a Member'. The level of benefit will differ from member to member. It depends on his years of service, earnings, and other factors. Subclause (3) sets out the various formulas to be used in arriving at the level of benefit in the particular circumstances of a member. Take a case that falls under the simple formula '2.25 x Relevant Earnings x years of Accredited Service'. If the relevant earnings were RM9,000 and the years of service were 33, the level of benefit applicable to the member concerned would be RM668,250.

[14] There are set out in sub-cl (2) of reg 5, in paragraphs (a) and (b), certain benefits that have already accrued or been paid to a member. The accrued benefits are under paragraph (a). These are employers' contributions to two funds, the 'Local Provident Fund', that is the PF [subparagraph (i)], and the 'State Fund', that is the EPF [subparagraph (ii)], and interest on such contributions. There are no funds under subparagraph (iii). The benefits that have been paid are under paragraph (b). These have hardly featured in this case. The controversy in this case has centred on employers' contributions in the EPF and the PF, especially the EPF. For the sake of convenience and for want of a better term, the benefits under paragraphs (a) and (b) will be referred to as 'accrued benefits'.

[15] Now sub-cl (2) says that the benefit due from the RBF 'shall be a lump sum', but not any lump sum. It is a lump sum — and these words are of critical importance — 'sufficient to bring the aggregate of [the accrued benefits] up to the level of benefit specified in sub-cl (3) hereof'. Take the example just now of a member whose level of benefit is RM668,250 and assume that his accrued benefits consist only of employer's contributions in the EPF amounting to RM200,000. The lump sum that will be sufficient to bring the aggregate of the accrued benefits (RM200,000) up to the level of benefit of RM668,250 will be RM468,250. That is the lump sum that constitutes the benefit due to the member from the RBF. If he happens to be also a member of the PF — and there are only 57 in this case — and his employer's contributions in the PF amount to RM10,000, the accrued benefits will increase in

total to RM210,000, and the lump sum sufficient to bring the aggregate of the accrued benefits (RM210,00) up to the level of benefit of RM668,250 will be RM458,250. That is the lump sum that constitutes the benefit due to the member from the RBF. If he has received benefits that fall under paragraph (b), the aggregate of the accrued benefits will increase further and the lump sum that constitutes the benefit due to him from the RBF will decrease accordingly.

[16] It is obvious, therefore, that the aim of the employers in establishing the RBF was to ensure that at the end of his service an employee will enjoy, or will have enjoyed, retirement benefits from all sources of at least a certain amount. If the benefits from sources other than the RBF — that is the accrued benefits — do not come up to that amount, then the RBF will come in to make up for the deficiency by supplying it. The target amount is the level of benefit and the supplied deficiency is the benefit due from the RBF. It is a top-up. If there is no deficiency, the target of the RBF is reached and nothing is due from the RBF. Or if the accrued benefits are more than the level of benefit, as happened in the case of a few plaintiffs, the target has been exceeded, and nothing is due from the RBF. The member will be enjoying, or will have enjoyed, a greater amount of retirement benefits than the target set by the RBF. It is not true, as submitted by Dato' Dr Cyrus Das on behalf of the plaintiffs, that in such cases the member will be indebted to the RBF for the excess. Such being the nature of the RBF, there will be no basis on which to make the member become indebted to the RBF for the excess. The member will not have received anything from the RBF.

[17] It is elementary that, arithmetically or accounting-wise, to arrive at the lump sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit specified in sub-cl (3), all that needs to be done is to subtract or deduct the accrued benefits from the level of benefit and arrive at the difference or the top-up, which, if any, will be the lump sum. That is what was done in the calculations of the RBF entitlement of members that have been exhibited in this case. The summary of each calculation begins with the 'Opening Balance', which is the level of benefit. The deductions come after the word 'Less'. In all cases there are the EPF deductions. In a few cases there are also the PF deductions. These deductions are respectively described as 'Company Contribution on EPF' and 'Company Contribution on SSSPF'. But the deductions are only an arithmetical or accounting way of arriving at the sufficient lump sum. They are not deductions by taking away from the member. The member is not deprived of the deducted EPF and PF contributions. Such deprivation there cannot be, when the whole idea of the RBF is to ensure that, with the accrued benefits, and any necessary top-up from the RBF, the member will at least enjoy his level of benefit.

[18] Dato' Cyrus cited various instances in which he said the defendants admitted making deductions of employers' EPF and PF contributions and instances in which he said that the defendants contradicted themselves by denying making deductions of those contributions. We have examined those instances and we find that where the defendants admitted making deductions they meant deductions in the arithmetical or accounting sense that has been explained, that is deductions for the purpose of determining the lump sum to which the plaintiffs were entitled from the RBF and

not deductions from what they were entitled to from the RBF, but where they denied making deductions they meant deprivative deductions in the sense alleged by the plaintiffs, which we will come to in a while.

[19] In our judgment, therefore, the defendants were right in their defence in paragraphs 20 and 22 of the trustees' statement of defence that has been set out earlier. They were right in their stand that in arriving at the lump sum they acted within reg 5(2) and that, as far as concerned the plaintiffs' grievance as to deductions made, the manner in which they arrived at the lump sum did not involve reg 7.

[20] The last sentence of sub-cl (2) of reg 5 says: 'In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Regulation 7', which sets out the deductions that are to be made, not in calculating the lump sum constituting the benefit due from the RBF, but 'in calculating the amount of a Member's benefit'. These words echo the words in reg 5(1): 'the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8', sub-cl (1) of which says: 'When a Member leaves Company Service … he shall be entitled to be paid the net amount of his benefit calculated in accordance with Regulation 5 …'. The term 'net amount' in regs 5(1) and 8(1) has been the subject of a bit of submission by Dato' Cyrus. It simply means that while the benefit due to a member from the RBF is the sufficient lump sum specified in sub-cl (2) of reg 5, what is actually to be paid to him is the net amount after making the deductions authorized by reg 7, if any. If no deduction falls to be made under that regulation, the net amount is the full lump sum. Of course, in this case, if there had been any deduction to be made under reg 7 it would have been made — although we do not recall that in any of the exhibited calculations any amount, besides the EPF and PF amounts that needed to be subtracted to arrive at the sufficient lump sum, was pointed out to us as being a deduction under reg 7 — but such a deduction would not have been the subject of the plaintiffs' grievance.

[21] The learned judge's understanding of what the lump sum is, is expressed in the following words at p 59 of his judgment:

> A plain reading of the Regulation 5(2) clearly shows that the entitlement is a lump sum. This lump sum is an aggregate of the sum in paragraph [sic] of (a) and (b) of Regulation 5(2). The determinative factor for the amount of the lump sum is the formula in Regulation 5(3) for the computation of the level of benefit and entitlement. If for a moment we ignore the amount to be deducted under Regulation 7, it would be obvious that the lump sum under Regulation 5(2) would be equal to the amount computed under Regulation 5(3). If not for the deduction under Regulation 7, this lump sum would be payable to the plaintiffs. However if the deductions under Regulation 7 is [sic] taken into account the lump sum payable is less the amount deducted. It is this deduction that is being challenged, particularly the deductions under Regulation 7(1)(c). This is one of the reasons that I cannot accept the defendants' submissions that the lump sum is a top up to the retirement benefits payable to the plaintiffs by way of EPF contributions.

[22] One thing to be observed in that passage is the judge's view that the aggregate of the amounts in paragraphs (a) and (b) of reg 5(2) — the 'accrued benefits' — is

the lump sum and that it 'would be equal to the amount computed under Regulation 5(3)', that is the level of benefit. This view is reflected in the formula that the judge produced at p 33 of the judgment. The aggregate of the accrued benefits cannot as a rule be equal to the level of benefit. It could be so only in a rare case and only if, by a fluke or a miracle, the aggregate of accrued benefits and the level of benefit, when they came to be computed, happened to be two amounts that were exactly equal. Dato' Cyrus, while endeavouring to support the judge, improved on that view of the judge's by saying in oral submission that it would have been better if a third figure were added to the formula, the third figure being the top-up. That would be a perfectly correct arithmetical statement in cases, as are all the cases in this case but a few, where the accrued benefits were less than the level of benefit. In such cases, since the top-up would be the sum sufficient to bring the aggregate of the accrued benefits up to the level of benefit, of course, arithmetically, the aggregate of the accrued benefits plus the top-up must equal the level of benefit.

[23] But the serious error in this case is the judge's view, as may be inferred from the passage quoted just now and better seen in the judge's said formula, and Dato' Cyrus's contention, as expressed in his oral submission, and the belief that the plaintiffs held or were led to hold, that the lump sum that constitutes the benefit due from the RBF is the level of benefit. The judge's formula, with a commonly accepted amendment, is that the net benefit due from the RBF is (A + B = C) – D, where A and B are the amounts under reg 5(2) – the 'accrued benefits' – C is the level of benefit, and D is an authorized deduction or deductions under regulation 7. In his oral submission Dato' Cyrus said, as recorded: 'Our submission is that the lump sum is (a + b) plus the 3rd sum if necessary to bring (a + b) to level of benefit. The lump sum is the aggregate sum of (a) + (b) + top-up and not just the top-up'. Since, as has been seen, that aggregate must, of arithmetical necessity, be equal to the level of benefit, the submission amounted to an assertion that the lump sum must be the level of benefit. That is patently wrong. The error arose from a failure or refusal to appreciate or recognize the true significance of the critical words 'sufficient to bring the aggregate of [the accrued benefits] up to the level of benefit specified in sub-cl (3)' that qualify or describe what the lump sum is that constitutes the benefit due to a member from the Fund.

[24] It was because they held the notion that the RBF benefit that they were entitled to was the level of benefit, which was a wrong notion, that the plaintiffs became aggrieved when they discovered upon receiving their RBF benefit that the Trustees had deducted the accrued benefits, particularly the EPF contributions, from their respective levels of benefit. They would not recognize that the deduction was made in the arithmetical implementation of sub-cl (2) of reg 5 in order to arrive at the sufficient lump sum, because that would be the legal answer to their grievance that would make it legally baseless. Instead they turned to para (c) of reg 7(1) and contended that the deduction was made under that paragraph. From that paragraph their counsel, in this appeal, chose the words 'any payments which a Company shall by law … have been required to make to the Member … by way of additional remuneration or benefit beyond his ordinary remuneration' and argued that the employer's EPF contributions fitted into those words and then, turning to the two sections of the EPF Acts, further argued that the amount of the level of benefit which

A the plaintiffs contended was the benefit due to them under the RBF was 'wages or remuneration' and that therefore the employer's EPF contributions had been deducted or recovered from their wages or remuneration in contravention of the two sections. Mr. Robert Ham QC for the defendants countered those arguments on para (c) of reg 7(1) and the two EPF sections with several tiers of argument, so that in
B appeal No 1075 something like half of the argument was devoted to these matters.

[25] In this case there was only one instance of 'deduction' of the EPF and PF benefits and that was, as we said, an arithmetical or accounting deduction to arrive at the sufficient lump sum, and not a deprivative deduction. There has not been
C another instance of deduction of those benefits, to be seen as a reg 7(1)(c) deduction. Since the plaintiffs would not have been driven to construe that regulation in the way that has been done in this appeal and in the High Court had they not held the notion that the lump sum was the level of benefit, and since that notion is patently wrong, the defendants' appeal No 1075 has to be allowed without the necessity of entering
D upon a deliberation of the arguments concerning reg 7(1)(c) and the two EPF sections and making a reasoned finding as to the correctness of the High Court's declarations concerning that regulation. It would be a purely academic exercise, and one of a very involved nature, that is not required to be carried out in order to dispose of appeal No 1075. Those declarations were sought solely to entitle the plaintiffs to a restitution of the alleged deductions. There had been no deductions under or by
E virtue of para (c) of reg 7(1) and the plaintiffs were not entitled to any restitution or, in other words, to succeed in their action. To order restitution, as the High Court did, would be to compensate them for what they had not lost but were always available for their enjoyment and benefit.

F **[26]** We will, nevertheless, say a few words generally about para (c) of reg 7(1). That paragraph of course does not mention employer's EPF contributions. It was only by resorting to the argumentative faculties and calling in aid various authorities that the plaintiffs sought to establish that 'any payments which a Company shall by law … have been required to make to the Member … by way of additional
G remuneration or benefit beyond his ordinary remuneration' would or could cover employer's EPF contributions. It is an irresistible reflection that if, before they became aware of the manner in which their RBF entitlement was computed, a suggestion had been made that the employer's EPF contributions might be deducted from their RBF entitlement by virtue of para (c) of reg 7(1) because the words in question were capable of referring to the employer's EPF contributions,
H the plaintiffs would have come out strongly against such a construal of the words. It could not have been the intention of the member companies who established the RBF and the regulations to deduct employer's EPF contributions from the sufficient lump sum that constitutes the benefit payable under the RBF and to resort to para (c) of reg 7(1) to enable that to be done, and therefore it could not have been their
I intention that the paragraph be subtly framed using the words in question to achieve that purpose, because to deduct employer's EPF contributions from the lump sum would not only expose them to accusations of illegal action and fraud on employees but would result in no employee getting any benefit from the RBF and in the RBF becoming a futile exercise, and it is inconceivable that those companies would embark on such an absurd, pointless and perilous undertaking.

[27] We therefore allow the defendants' appeal No 1075 with costs and set aside the orders made by the High Court in favour of the plaintiffs. We also order that the deposit be refunded to the defendants. Since the defendants succeed completely in appeal No 1075, it is not necessary to answer the question whether, even if the defendants should fail in their appeal on the O 14A questions, the restitutionary orders ought nevertheless to be set aside or suspended pending the trial of the issue of limitation. The question arose because the defendants had in their statements of defence raised the defence of limitation which in the appeal the defendants contended had still to be tried, notwithstanding that the O 14A questions had been answered in the High Court in favour of the plaintiffs, before the judge could finally decide the action and grant the reliefs sought.

[28] Appeal No 1177 is the plaintiffs' appeal against the High Court's refusal of the prayers concerning unjust enrichment and breach of trust. Since those prayers were sought on the premise that there had been wrongful deductions from the plaintiffs' RBF entitlement, and since in our judgment there were no such deductions, we dismiss appeal No 1177 with costs and order that the deposit be paid to the defendants to account of taxed costs.

Defendants' appeal allowed. Plaintiffs' appeal dismissed.

Reported by Peter Ling